Supreme Court, U.S.
FILED
04 632 SEP 3 - 2004

No. _____

IN THE
Supreme Court of the United States

_____ * _____

BENI-JO KUAMOO; RICHARD L. KELA

Petitioner(s)

v.

UNITED STATES OF AMERICA, GEORGE W. BUSH, et al.

Respondents'

_____ * _____

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

_____ * _____

PETITION FOR CERTIORARI

_____ * _____

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Pro Se of Record

QUESTIONS PRESENTED FOR REVIEW

Did the court of appeals err in affirming the district court's dismissal of petitioners' enforcing leaseholder agreement, invalid under Hawaii's compact-claim by the Court failing to follow the Hawaii Admission Act § 4, compact implementing the Hawaiian Homes Commission Act, 1920, a constitution law or an act of Congress Public No 34-67th Congress [s. 1881] Title 1, 2, and 4 "Repeal Inconsistent Legislation" save clause of July 9, 1921, provision of Congress power of § 5 Fourteenth Amendment of the Constitution, when it upheld the district court's rejection of petitioners' proof of State Legislation Act 207 1963, are repealed, and further failing to address State leaseholder agreement with petitioner' are void as required by Act of Congress.

PARTIES TO PROCEEDINGS

UNITED STATES OF AMERICA; GEORGE W. BUSH, in his official capacity as the President of the United States; BENJAMIN J. CAYETANO, in his official capacity as the GOVERNOR, of the State of Hawaii; RAYNARD C. SOON, individually and in his official capacity as the Chairman, Hawaiian Homes Commission; WONDA MAE AGPALSA; HENRY CHO, TOM CONTRADES; ROCKNE FREITAS; HERRING KALUA; MILTON PA; JOHN A. H. TOMOSA, in their individual capacities as members of the Executive Board of the Hawaiian Homes Commission

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is Kuamoo, and Kela v. United States of America George W. Bush et. al, it is set forth in the Appendix I. at App. 1-2. The opinion of the United States District Court for the Hawaii is not reported. It is set forth in the Appendix II

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The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court for Hawaii was entered on March 6, 2004. The Court's order denying rehearing and recommend denial of the petition for rehearing en banc. It is set for in the Appendix III at App. 6

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BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court for Hawaii was entered on March 6, 20003. The Court's order denying rehearing was entered on June 9, 2004. This petition for writ of is filed within ninety days from that date. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

*

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are: Hawaiian Homes Commission Act of 1920, (hereinafter "Homestead Act or HHCA") as amended, c. 42, 42 Stat. 108, enacted by Congress, Public No. 34- 67th Congress, [s.1881] in Title 1, 2 and 4 of July 9, 1921:

An Act to amend an Act entitled "An act to provide a government for the Territory of Hawaii" approved April 30, 1900, as amended, to establish an Hawaiian Homes Commission granting certain powers to the board of harbor

commissioners of the 'Territory of Hawaii, and for other purposes:

Congress provisions of the HHCA:

§ 202: (a) there is hereby established a commission to be know as the "Hawaiian Homes Commission,"

§ 223: The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

Title 4 Miscellaneous Provision of Public No. 34-67th Congress, Repeal Inconsistent Legislation "savings clause" of § 401, §402:

Sec. 401. All Acts or parts of Acts, either of the Congress of the United Sates or of the Territory of Hawaii to the extent that they are inconsistent with the Provisions of this Act, are hereby repealed.

Sec. 402, If any provision of this Act, or the application or such provision to certain circumstances is held unconstitutional, the remainder of the 'Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated there by. Approved, July 9, 1921.

Those provision was Incorporation in Hawaii Admission Act (1959) Public Law 86-3, 73 Stat. 4, includes in its § 4, a federal-state compact requiring establishment of the Hawaiian Home Commission Act of 1921, as amended under the State of Hawaii Constitution and further requiring federal consent for its amendment, with additional particular requirements, the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said act shall not be increased except with the consent of the United States.

*

STATEMENT OF THE CASE

This petition is a native Hawaiian race, [1] within its jurisdiction seeks a writ of certiorari to the court of appeals from its affirmance of State Defendants' Motion to dismiss on the petitions' compact/claims of the State of Hawaii, Legislation Act 207 (1963), have establish its State, Department of Hawaiian Home lands and its board known as the Hawaiian home commissions, approved petitions leaseholder agreement executed before Congress consent. It turns on the court of appeals' failure to consider evidence it was required to consider under Nixon v. United States, 289 F 177 (1923) (Circuit Court of Appeals, Ninth Circuit. May 21, 1923 No. 3976), because it supported petitions' pretext case and their proof of State of Hawaii defendants unlawful continuing conspiracy and discrimination, to oppress homesteader validity of State leaseholder agreement with petitions executed before Congress consent and the court failure to address the legal principles and as well as the historical evidence of Congress powers to Repeal Inconsistent State Legislation. The Court should either grant certiorari and reverse or, in the alternative, vacate the judgment below and remand for reconsideration in light of NIXON "Congress authority over Homestead Act."

Petitioners are intended third party beneficiaries of the Admission Act compact under State/Federal class legislation, in a co-operative federalism, a constitution law

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[1] In Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998) affirmed. "The Court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes contains a racial classification on their face."; See: Keaukaha-Panaewa Community Association v. Hawaiian Home Commission, 739 F.2d at 1470 (9th Cir. 1984 stated: "a special benefit has been enacted for them as members of a class"; also see Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1223 (9th Cir. 1979), "it is clear, however, that the home lands were to continue to be used for the benefit of native Hawaiians as defined by the Commission Act.

or an act of Congress (Homestead) provision section 5 Fourteenth Amendment of the United States Constitution

Petitioners brought this action on June 25, 2002 under both Admission Act and the Homestead Act, alleging that respondents' practice of Petitioners leaseholder agreement issued constituted intentional unlawful continuing conspiracy and race discrimination, of petitioners compact/claims. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 1332 1446, 22O1, 2202, under 42, U.S.C. §§ 1983 and 1985.

On February 28, 2003, respondents moved for dismiss, on petitioners' compact/claims that State Defendants continuing promulgation and threatened enforcement of Act 207 (1963) amended § 202, HHCA, by deleting entire section, overthrew the Hawaiian Home Commission powers granted by 67th Congress. By this means, from 1963 to 1986, all State leases invalid and void, "Repeal Inconsistent State Legislation saving clause of Title 4: §§ 401, 4O2, Public No. 34-67th Congress of July, 9, 1921.

First, the Judge King's expressed that Petitioners' complaint, assert in their complaint that the leases issued to them by the Department of Hawaiian Homes lands void, they seek to prevent the States Defendants (the former Governor of the State of Hawaii and individual members of the State Department of Hawaiian Home lands) from enforcing "leaseholder agreements "because the agreements are unlawful and in breach of §§ 4 and 5(f) of the Hawaii Admission Act and citing Hou Hawaiian v. Cayetano, 996 F. Supp. 989 (D. Haw. 1998) and,

The State is apparently evicting Petitioners for failure to comply with lease terms. Plaintiffs assert that the State Defendants' "continuing promulgation and threatened enforcement" of Act 207, an act passed in 1963 that amended various sections of the Hawaiian Homes Commission Act, is invalid and, Further stated: The allegation is apparently based upon an argument that Act 207 was void without consent of the United States citing

not 1, such consent was obtained. See 100 Stat. 3143 (1986)

Judge Kings' side stepping Petitioners' compact/claims by stating, such consent was obtained in 100 Stat. 3143 (1986). But failed to rebut or address the legal principles of 67th Congress', authority over Title 4, *Repeal Inconsistent Legislation*, savings clause, the question of the power of Congress provision of § 5 Fourteenth Amendment to the United States Constitution to Repeal inconsistent State Legislation Act 207 (1963) is the issue in this case. The court did not mention petitioners' historical evidence. [2]

Second, the court rejected petitioners' pretext case as not "***persuasive***" In doing so it ignored much of petitioner's evidence on the issue.

It ignored petitioners' evidence that the leasehold agreement upon Hawaiian home land, conflicts with Congress' authority Homestead Act, severability clause of Title 4. Repeal Inconsistent Legislation either of Congress of the United State or the State of Hawaii, within its jurisdiction thereof. Indeed, the court limited its review to a single aspect of petitioners pretext case, evidence that Act 207 in operation from 1963 to 1986, absent consent of Congress of the United States, based on Judge King's footnote 1 (such consent was obtained. See 100 Stat. 3143 (1986).

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[2] The court of appeals decision reflects confusion about whether the evidence was ever presented in the district court. In fact, petitioners asserted their historical evidence Title 4. Inconsistent State Legislation throughout the case. (See C.A petition for re-hearing for en banc) Even though the district court refused to certify the 67th Congress authority to Repeal Inconsistent State Legislation, Act 207 pursuant to Title 4, §§ 401, 402 . The district court simply ignored the steering evidence in analyzing Act 207, are repeal and the court of appeals, while recognizing that proof of steering would have made petitioners leasehold agreement claim invalid and void. The district court on the belief that no such evidence had been asserted or offered. This was entirely contrary to the record. See notes 1 Such consent was obtained in 100 Stat. 3143 (1986)

On appeal, petitioners argued that an Act provide for the admission of the State of Hawaii into the Union includes in its § 4 a **federal-state compact** requiring establishment of the 67th Congress; authority over Homestead Act under the State Constitution and further **requiring** federal consent for its amendments, with additional particular requirements, such as that the encumbrances authorized to be placed on Hawaiian Home lands by officers other than those charged with the administration of said Act (referring to Public No. 34-67th Congress chap. 42, Commission power over the Act), ***Shall not be increased, except with the consent of the Congress and the President of the United States*** and thus, henceforth, however, the severability clause should be applied with care, so as not to ***create*** doubt where none should exist, pursuant to Title 4: §§ 401, 402 (Repeal Inconsistent Legislation)..

The question on the suit seeks redress for a past breach of trust. The court cited Hou Hawaiians. 183 F.3d at 949 but whether it was sufficient as a whole to permit the State, Department of Hawaiian Home Land and the State commission leasehold agreement with petitioners under Act 207, (repeal inconsistent State legislation).. Without addressing the standard for judgment review, of legal principles of Congress authority over Homestead Act and it provision under Title 4 "Repeal Inconsistent Legislation." However, the court of appeals affirmed. [3]

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[3] Addressing the pretest issue first, the court essentially reported the district court's conclusion, without its own analysis for the record, that petitioners had "produced on persuasive evidence" that respondents' justification was pretext. Like the district court, the court of appeals appeared to confuse the question of whether State Defendants' honestly believed that the asserted differences existed with the real question – Whether State Defendants' motion to dismiss honestly when he asserted that the differences were his motivation for breach of compact decisions.

Regarding petitioners' other evidence of "animus" moreover, the court of appeals' discussion was confused and misleading. It began by asserting that it was "Petitioners" seeks to compel United States to

REASONS FOR GRANTING THE WRIT

The writ should be granted. Has the court of appeals followed this Court's clear instruction in Nixon or United States v. Philadelphia dictating, what evidence to consider and what to disregard, the disposition of petitioners' appeal would almost certainly have been different. Nixon also resolved widespread confusion among the lower courts regarding unlawful continuing conspiracy and discrimination, to oppress homesteader validity of State leasehold agreement with petitions executed before Congress consent or Repeal Inconsistent Legislation.

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sue the State of Hawaii for trust at App.6. In not so, the facts on records establish that President of the United Sates, sue as a are parties by contract and/or consent to Hawaii's Compact and the President failed to protect Petitioners benefits under an act of Congress under Hawaii compact in a co-operative federalism, of the State of Hawaii invasion and overthrow 67th Congress, have establish an Hawaiian Homes Commission and a class of lands separate and distinct from other public lands to be utilized for the Native Hawaiians race. The Provision of the act further vest control over the use of such lands in the Hawaiian Homes Commission and not in any other government agency, because it will establish or justify such racial discrimination in the adoption of Article XI Section 1-3 (Amender in 1978) to Article XII) of the State Constitution. Because that claim is barred by the sovereign immunity of the United States cited Hou Hawaiian v. Cavetano.183 F.3d 945, 947 (9th Cir 1999). The courts proposition conflicts directly with Nixon (Congress authority over Homestead Act and it provision) as held in United States v. City of Philadelphia, 644 F.2d 187 (1980) stated "Federal courts must be "alert to adjust their remedies" to grant relief for invasions of federally protected rights, citing Pell v. Hood, 327 U..S. 678, 684, 66 S.Ct. 773, 776, 90 L.Ed 939 (1946) and further stated but they are equally bound to give proper recognition to the principles of federalism that underlie the very structure of the Constitution from which the federal courts and the Federal Executive alike derive their authority." at 198. Further stated the constitution provides that congress shall make laws, the president execute laws, and courts interpret laws." (at 203) however in which the Court made clear that compact/claims is barred by the sovereign immunity and not by Congress authority Repeal Act 207 (1968) inconsistent state legislation.

In reviewing petitioners' evidence and the district court's analysis, the court of appeals neither cited Nixon followed its directives on these questions.

Specifically, Nixon held that No such right exists or can exist outside of an act of Congress. The Constitution of the United States, by article IV section 3, in express terms vests in Congress "the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.' at 179 and further stated:

> *It is the right to remain on the land in order to perform the requirements of the act of congress, and according to its rules, perfect his incipient title.*

Whenever the acts complained of are of a character to prevent this or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United Sates and granted by that law, those acts come within the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute. at 180.

On the pretext issue in the present case, in particular, the court of appeals was required to grant relief for invasions of federally protected rights, of federalism that underlie the very structure of the constitution from which the federal courts and the Federal Executive alike derive their authority as held in United States v. Philadelphia. The Court failed to address any of this evidence, However. The Court compounded these errors, moreover, in summarily adopting the district court's rejection of what small portion of petitioner's evidence of Congress authority repeal Act 207 (1963) pursuant to Title 4.

If the court had considered all of the evidence supporting petitioners' case in Nixon and United States v.

City of Philadelphia that the State leases are invalid and void, requited, and
disregarded evidence that petitioners had impeached, the outcome of the appeal would almost surely have been different.[4]

In the present a grant, vacate and remand would be proper for several reasons. First, Nixon Congress authority over Homestead Act and the court of appeals did not cite it and apparently did not consider it. If Nixon and United States v. Philadelphia had been followed, there is a strong likelihood that the result would have been different.

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CONCLUSION

It has been said that the Congress' enactment of the Hawaiian Homes Commission Act, 1920 incorporation in the Hawaii Admission
Act Section 4, 5 compact "did little more than produce a statutory skeleton from which the federal judiciary has been left to create, through a case-by-case decisional process, a fully developed body of constitution and law, by Congress federalism.

There have been 80 years of jurisprudentially creativity and a number of often conflicting standards have been fashioned:

> . . .[T]he courts have been unable to agree as to the meaning of the jurisdictional criteria. The resulting ambiguity has been criticized as threatening the important policy of uniformity that underlies the constitution and law, Congress' enactment of the

[4] The same rationale applies to the court's review of petitioners' other "animus" evidence, in that the court ignored the most important piece of evidence supporting petitioners position - evidence that respondents Act 207 (1963) are "Repeal Inconsistent State Legislation." That evidence, which the court or appeals recognized would have defeated State defendants motion to dismiss, should have been considered as evidence supporting the petitioners' leases with the state invalid.

Hawaiian Home Commission Act, 1920 provision "saving clause" of Repeal Inconsistent Legislation" is in disarray. The Supreme Court must do some housekeeping as held in Rice v. Cayetano, _____ U.S. _____, 120 S.Ct. 1044, 1055 (2000). There are compelling reasons: the jurisprudence needs to be put in order: relevant policies underling the doctrine of Congress pre-emption or Congress authority to "Repeal Inconsistent Legislation" of said act and must be identified and weighed; uniformity is essential.

There are splits in the circuits on several key standards which must be balanced to make native Hawaiian enforcement of contractual obligations by intended Hawaiian home lands beneficiaries and appropriate avenue, whereby such parties may secure the homestead right described for their benefit in the § 4and § 5 state-federal compact, fair and manageable and on limiting the courts prejudice and State defendants discriminating against . . . native Hawaiian and none beneficiaries with the state lease fraudulent contract "lease" upon Hawaiian Home lands

A refusal by U.S courts to accept jurisdiction in this case will mean a denial of native Hawaiian and none-beneficiaries (and thousands like them have a lease form 1963 to 1986 are void), without good reason.

Therefore, the foregoing reasons, the writ should be granted and the decision of the Ninth Circuit Court of Appeals should be reversed or, in the alternative, summarily vacated and remanded for consideration in light of this Court's recent decision in Nixon and United States v. Philadelphia.

Respectfully submitted,

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Petitioner(s)

- Counsel of Record

A

Appendix I

In The
United States Court of Appeals for the Ninth Circuit

No. CA 03-15615
Beni-Jo Kuamoo; Richard Kela

Plaintiffs-Appellants,

v.

United States of America, et. al.,

Defendants, Appellees

Appeal from the United States Court for Hawaii
No. 02-00384 SPK-LEK – SAMUEL P. KING, Judge.

Decided March 4, 2004

Before CHOY, FARRIS, and LEAVY, Circuit Judges.

Beni-Jo Kuamoo and Richard Kela, appeal pro se the district court's dismissal under Fed. R. Civ. P.12(b)(6) of their action against state and federal defendants seeking an injunction to halt enforcement of residential lease issued by the Department of Hawaiian home Lands. We have jurisdiction over this timely appeal under 28 U.S.C. § 1201 and, after de novo review, we affirm.

Because the parties are familiar with the facts and prior proceedings. We recite them here only as necessary to our disposition.

Appellants' complaint fails to allege the requisite causal connection between the

State defendants sued in their individual capacities and the allegedly illegal enforcement of the leases. The district court did not err in dismissing the individual capacity claims against the state defendants. See Rouds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1036 n.2 (9th Cir. 1999), Taylor v.List. 880 F.2d 1040, 1045 (9th Cir. 1989)

This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Because appellants' claims seek to invalidate lease agreements that, they assert, were issued in past breach of trust, the district court did no err when it dismiss the claims against the
Governor of Hawaii and Chairman of the Hawaiian Homes Commission and official capacities. See Papasan v. Allain, 478 U.S. 265, 278-79 (1986); Ulaleo v. Paty, 902 F.2d 1399-44 (9th Cir. 1990). Appellants' action seeks to compel the United States to sue the State of Hawaii for breach of trust. Because that claim is barred by the sovereign immunity of the United States, see Hou Hawaiians v. Cayetano, 183 F3d 945, 947 (9th Cir 1999), the district court did not err when is dismissed the claims against the federal defendants.

AFFIRMED

Appendix II

United States District Court Circuit for the District of Hawaii

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Beni-Jo Kuamoo; Richard Kela

Plaintiffs-Appellants,

v.

United States of America, Et. al.,

Defendants, Appellees

No. 02-00384 SPK-LEK
SAMUEL P. KING, Judge

Order Dismissing Action March 4, 2004

Before Samuel P. King, Judge

Defendants Benjamin Cayetano, Raynard Soon, Wonda Mae Agpalsa, Henry Cho, Tom Contrades, Rockne Freitas, Herring Kalua, Milton Pa and John Tomoso ("State Defendants"), in their individual and official capacities, move to dismiss the complaint for failure to state a claim. The Court finds the matter suitable for decision without an oral hearing under LR 7.2 (d). For the reasons set forth, the Court GRANTS the motion. As best the Court can glean from their complaint, Plaintiffs Beni-Jo Kuamoo and Richard Kela assert in their complaint that leases issued to them by the Department of Hawaiian Homelands are void; they seek to prevent the States

Defendants (the former Governor and the State of Hawaii and individual members of the State Department of Hawaiian Homelands) from enforcing "leaseholder agreements" because the agreement are unlawful and in breach of trust of sections 4, and 5(f) of the Hawaii Admissions Act. See generally Hou Hawaiians v. Cayetano, 996 F. Supp. 989 (D. Haw. 1998). The State is apparently evicting Plaintiffs for failure to comply with lease terms. Plaintiffs assert that the State defendants' "continuing promulgation and threatened enforcement" of Act 207, an Act passed in 1963 that amended various sections of the Hawaiian Homes Commission Act, is invalid. The allegation is apparently based upon an argument that Act 207 was void, without consent of the United States. 1/ Plaintiffs ask this Court to (1) declare such consent was obtained. See 100 Stat. 3143 (1986). Defendants in breach of trust, (2) enjoin them from continuing to operate, (3) appoint a receiver. Complaint at 9.

Initially, Plaintiffs' have sued all State Defendants except for Cayetano in their individual capacity. Complaint at 3. They have not, however, made any individual capacity allegations against them. They do not seek damages, only injunctive relief, apparently to stop the Department of Hawaiian Home Lands from enforcing their leases. They make no allegations that these individual defendants exceeded the scope of their authority or deprived them of a clearly established federal right. It has not been clearly established that the leases are unlawful (to the contrary, homestead leases under the Hawaiian Homelands program are lawful) under the allegations of the complaint, individual capacity claims cannot stand.

As for claims against the Governor in an official capacity, to the extent the suit seeks monetary relief, the Eleventh Amendment bars this suit. See. Papasan v. Allain, 478, U.S. 265, 276 (9th Cir. 1985). To the extent the suit

seeks only prospective injunctive relief, the Eleventh Amendment also bars the suit because the suit seeks redress for a past breach of trust. Id. 278-79; Price v. Hawaii, 764 F/2d 623,, 629 (9th Cir. 1985); Hou Hawaiians, 183 F.3d at 949 ("a challenge to the management of section 5 land is not a federally cognizable claim")

Finally, although the United States and George W. Bush, in his official capacity, have not appeared in this action, the Court also *sua sponte* dismisses the United States and George W. Bush as Defendants. Even if a breach of fiduciary duty by the United States or Bush were alleged or if it was demanded that the United States take action to enforce trust obligation under section 5(f), the Complaint would still fail to state a claim. See Han v. United States, 45 F.3d 333, 337 (9th Cir. 1995)
(finding no basis for general fiduciary obligation of United States to bring suit against Hawaii for breach of trust under Hawaiian Homes Commission Act, Section 5(f) allows but does not compel action by United States).

Therefore, the Court GRANTS the State Defendants Motion to Dismiss. Because the Complaint fails to state a claim against any Defendant, the Court DISMISSED the action.
Further amendment would be futile. Accordingly, the clerk shall enter judgment in favor of Defendants.
IT IS SO ORDERED.

Dated: 6, March 2003

/s/
SAMUEL P. KING
UNITED STATES DISTRICT JUDGE

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Appendix-III

Appendix III

United States Court of Appeals for the Ninth Circuit
No. CA O3-15615

Beni-Jo Kuamoo; Richard Kela

Plaintiffs-Appellants,

vs.

United States of America, et. al.,

Defendants, Appellees

Appeal from the United States Court for Hawaii
No. 02-00384 SPK-LEK – SAMUEL P. KING, Judge.

Before; FARRIS, AND LEAVY, Circuit Judges,

ORDER

Judges' Farris and Leavy vote to deny the petition for rehearing and recommend denial of the petition for rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing *en banc* are denied.